

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	2
Question presented.....	2
Statute and regulations involved.....	2
Statement.....	2
Argument.....	5
Conclusion.....	9
Appendix.....	10

CITATIONS

Cases:

<i>Armstrong v. Commissioner</i> , 143 F. 2d 700.....	7, 8
<i>Bradshaw v. Commissioner</i> , 150 F. 2d 918.....	8
<i>Commissioner v. Tower</i> , decided February 25, 1946.....	5, 6, 7, 8
<i>Earp v. Jones</i> , 131 F. 2d 292, certiorari denied, 318 U. S. 764.....	8
<i>Grant v. Commissioner</i> , 150 F. 2d 915.....	8
<i>Helvering v. Clifford</i> , 309 U. S. 331.....	7, 8
<i>Helvering v. Stuart</i> , 317 U. S. 154.....	8
<i>Loeh v. Commissioner</i> , 145 F. 2d 456.....	8
<i>Lusthaus v. Commissioner</i> , decided February 25, 1946.....	5, 6, 7, 8
<i>Miller v. Commissioner</i> , 147 F. 2d 189.....	7
<i>Stockstrom v. Commissioner</i> , 148 F. 2d 491, certiorari denied, October 8, 1945.....	7

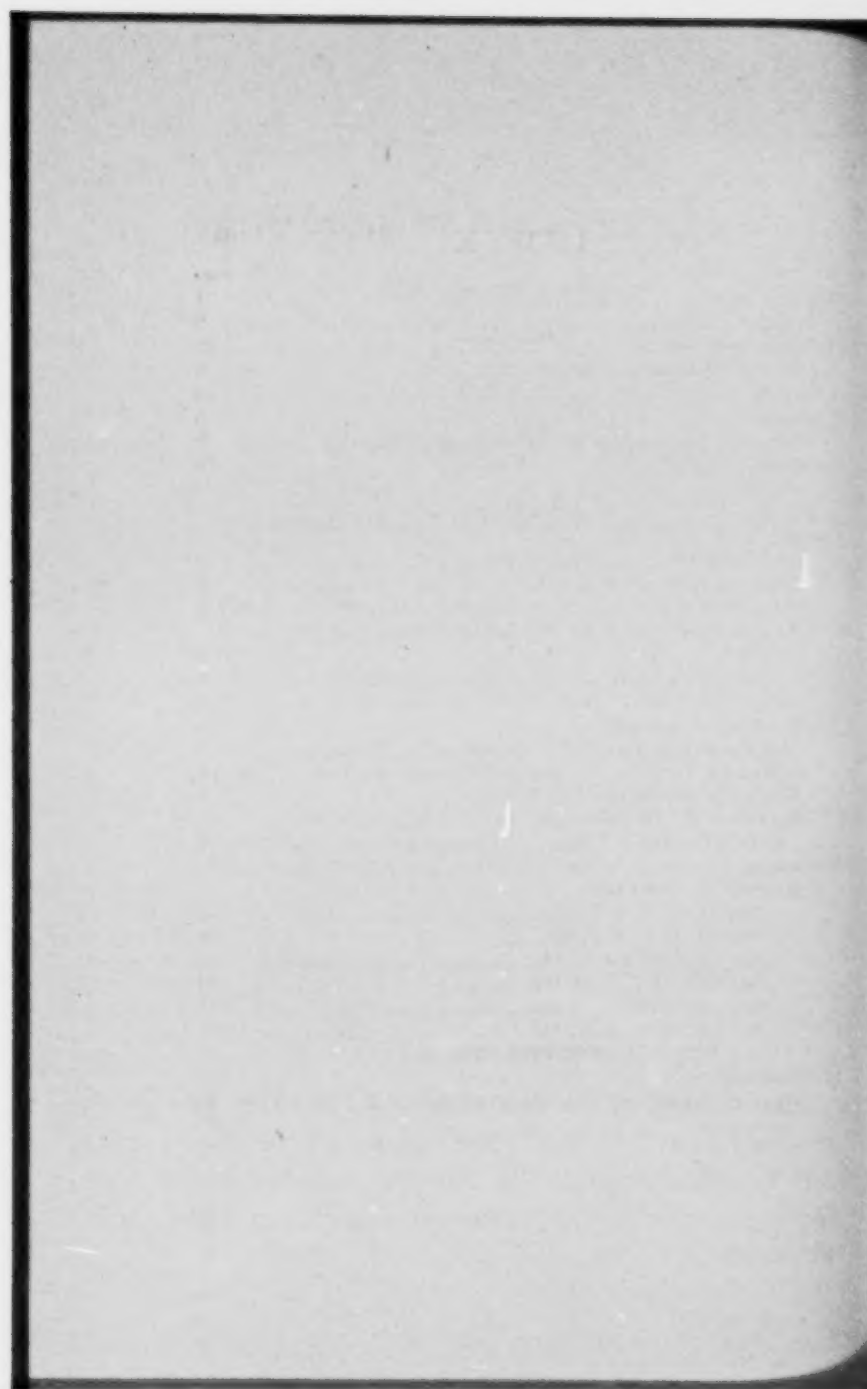
Statutes:

Internal Revenue Code:

Sec. 11 (26 U. S. C. 11).....	10
Sec. 22 (26 U. S. C. 22).....	10
Sec. 181 (26 U. S. C. 181).....	10
Sec. 182 (26 U. S. C. 182).....	10
Sec. 183 (26 U. S. C. 183).....	11
Sec. 188 (26 U. S. C. 188).....	11
Sec. 3797 (26 U. S. C. 3797).....	11

Miscellaneous:

Treasury Regulations 103, Sec. 19.22 (a)-1.....	12
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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1016

ROSE MARY HASH, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 1017

G. LESTER HASH, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 165-198) is reported at 4 T. C. 878. The opinion of the Circuit Court of Appeals (R. 202-208) and the dissenting opinion (R. 208-209) are reported at 152 F. 2d 722.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered December 31, 1945. (R. 209, 212.) The petition for writs of certiorari was filed March 29, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in sustaining the Tax Court's decision that income attributed by taxpayers to trusts for their daughters under so-called partnership agreements was includible in taxpayers' gross income as defined by Section 22 (a) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

These appear in the Appendix, *infra*.

STATEMENT

The material facts found by the Tax Court (R. 168-191) may be summarized as follows:

Taxpayers, husband and wife, have been business partners since shortly after their marriage. At the time of the transactions here involved they owned and operated as equal partners two flourishing businesses, one a furniture and clothing business known as the Hash Furniture Company and the other a finance business known as the National Finance Company. (R. 168-170). They have two minor daughters, Rosemary and Doris. After discussing with their accountant and their

attorney, Mann, the tax aspects of trusts in favor of the daughters, taxpayers on September 1, 1940 each executed an "Assignment and Declaration of Trust". The instruments were identical except that the one which the husband executed named the wife and Mann as trustees, the daughter Rosemary as primary beneficiary, and the wife as contingent beneficiary; while the one which the wife executed named the husband and Mann as trustees, the daughter Doris as primary beneficiary, and the husband as contingent beneficiary. (R. 170-171.) By these instruments, which were acknowledged and recorded, taxpayers purported to convey to the trusts one-half of their respective one-half interests in the National Finance Company. (R. 171-176.) On May 1, 1941 taxpayers each executed similar cross-trusts, this time covering one-half of their respective one-half interests in the Hash Furniture Company. (R. 186-187.) Gift tax returns were filed and the gift taxes paid. (R. 189.) On the same days that the trust instruments were executed taxpayers as individual partners entered into "partnership agreements" with themselves and Mann as trustees for the daughters; these provided that the businesses were thereafter to be conducted by taxpayers individually and the two trust estates as equal partners. (R. 178-187.) Each trust and partnership agreement to which it became a party was executed simultaneously and as part of a single transaction. (R. 191-192.)

After the execution of the foregoing instruments taxpayers continued to operate the businesses identically as before. Their daughters were schoolgirls, with no business experience, and contributed no services. Mann, the co-trustee named in the instruments, is the attorney retained by taxpayers to advise them concerning the plan and who prepared the documents. He is without experience in the businesses, and his activities as trustee have been limited to routine matters, such as endorsing and mailing checks and signing income tax returns for the trusts prepared by taxpayers' tax consultant. (R. 187-188.)

None of the business income allocated to the trusts has been distributed to the trusts or beneficiaries, but all has been retained and used in the businesses. (R. 189, 193.)

Following execution of the instruments, new books of account for the National Finance Company and the Hash Furniture Company were set up, and partnership returns were filed for each company on the basis of the fiscal years provided for in the new partnership agreements. In their individual income tax returns for the taxable years taxpayers did not include in their distributive shares the portions of the partnership net income attributed to the trusts. (R. 188-189.) The Commissioner disregarded the new partnership arrangement both for purposes of determining the owners of the businesses and the reporting

period of the old partnerships, and determined deficiencies against taxpayers for the taxable years. (R. 21-24, 43-47, 189.) The Tax Court sustained the Commissioner's determination that the entire business income remained taxable to taxpayers, but rejected his determination that the arrangement was ineffectual to change the tax years of the old partnership. (R. 191-198.) The Circuit Court of Appeals affirmed, District Judge Coleman dissenting. (R. 202-209.)

ARGUMENT

There is no occasion for further review. The disposition of these cases is controlled by *Commissioner v. Tower* and *Lusthaus v. Commissioner*, decided by this Court February 25, 1946, Nos. 317 and 263, not yet reported, with which the decisions below are in accord.

1. The question in these cases is the same as in *Commissioner v. Tower* and *Lusthaus v. Commissioner*, *supra*. The fundamental principles which this Court there held to be determinative of the federal income tax effect of family partnerships erected upon gifts are not any the less applicable where, as here, the gifts are in trust and the accompanying partnership agreements are with the trustee. The critical inquiry is whether the arrangement—whatever its legal cast—results in an actual change in the creation or control of the business income, or merely a reallocation of the income within the donor's

family. So tested, whether the claimed partnership has reality for federal income tax purposes presents a question for the Tax Court, whose conclusion is entitled to finality if supported by evidence.

The evidentiary support for the Tax Court's conclusion (R. 196) that the arrangement here "worked no substantial change in the economic status" of taxpayers is as potent as that which this Court held required affirmance of its like inferences in the *Tower* and *Lusthaus* cases. The cross-trusts and simultaneous "partnership agreements" between taxpayers individually and themselves (and Mann) as trustees for their daughters were intended as component parts of one transaction. (R. 191-192.) While the verbal ritual employed sufficed to alter naked legal rights, it produced no change in the management or conduct of the businesses, or the earning of the income in question. (R. 187-188, 194.) The trusts became "partners" in name, not in fact. Neither new capital nor additional services were brought into the businesses. Nor does the record disclose any business purpose to be served by the arrangement. In the *Tower* and *Lusthaus* cases this Court considered such features ample basis for the Tax Court's conclusion that the gifts and partnership agreements there involved, though formally perfect, were without federal income tax significance. The decisions below are

fortified by an additional factor, not present in either the *Tower* or *Lusthaus* case; the shares of the business income here attributed to the trusts as "partners" were not distributed, but were retained and used by taxpayers in the businesses. (R. 189, 193-194.) They thus continued to enjoy control over the income, as well as the principal, of the partnership interests they purported to give away. Affirmance of the Tax Court's decisions by the court below was clearly consonant with established rules, reiterated by this Court in the *Tower* and *Lusthaus* cases, governing the scope of appellate review of Tax Court decisions.

2. Taxpayers do not and cannot assert conflict with the controlling decisions of this Court in the *Tower* and *Lusthaus* cases. Isolating the trusts from the concurrent partnership agreements, they rely for conflict upon decisions of Circuit Courts of Appeals in cases "involving long-term irrevocable trusts". (Pet. 7.)¹ With the exception of *Armstrong v. Commissioner*, 143 F. 2d 700 (C. C. A. 10th), the cases relied upon

¹ Even if these cases be viewed in that distorted posture, there is no basis for taxpayers' assumption that the length of the period for which a grantor has parted with legal title is decisive of whether he has also parted with substantial economic ownership during the taxable year; the duration of the trust is but one of many factors to be considered by the fact-finding tribunal. *Helvering v. Clifford*, 309 U. S. 331, 336-337; *Stockstrom v. Commissioner*, 148 F. 2d 491 (C. C. A. 8th), certiorari denied, October 8, 1945; *Miller v. Commissioner*, 147 F. 2d 189 (C. C. A. 6th).

(Pet. 7-9, 13) do not involve family partnerships. Moreover, the *Armstrong* case was distinguished by the court which decided it in *Losh v. Commissioner*, 145 F. 2d 456, whose factual pattern resembles that of the instant cases; any remnant of its vitality which may have survived the *Losh* case appears to have been extinguished by the still later decisions of the same court in *Grant v. Commissioner*, 150 F. 2d 915, and *Bradshaw v. Commissioner*, 150 F. 2d 918. See also *Earp v. Jones*, 131 F. 2d 292, certiorari denied, 318 U. S. 764. In any event, whatever conflict in the field of "family partnership" cases existed among (or within) the circuits prior to this Court's decisions in the *Tower* and *Lusthaus* cases has now been authoritatively resolved by those decisions.

3. Taxpayers' assertion (Pet. 10, 12) that the decisions below "probably" conflict with and represent an "unwarranted expansion" of the principles of *Helvering v. Clifford*, 309 U. S. 331, is patently untenable in view of this Court's application of those principles, in the *Tower* and *Lusthaus* cases, to the very type of situation here presented. Nor is there anything in *Helvering v. Stuart*, 317 U. S. 154, with which taxpayers likewise assert "probability" of conflict (Pet. 11), which might be construed as departing from the basic principles enunciated in the *Clifford* case and implemented in the *Tower* and *Lusthaus* cases.

CONCLUSION

The petition for writs of certiorari should be denied.

Respectfully submitted.

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APRIL 1946.